ESTATE OF THOMAS LONGTAIL, JR.

IBIA 84-30 Decided March 27, 1985

Appeal from an order denying rehearing issued by Administrative Law Judge Daniel S. Boos in IP-BI-827B-81, IP-BI-92B-84.

Affirmed.

1. Indian Probate: Wills: Testamentary Capacity--Indian Probate: Wills: Undue Influence

   The burden of proof as to testamentary incapacity or undue influence in Indian probate proceedings is on those contesting the will.

2. Indian Probate: Wills: Undue Influence

   To invalidate an Indian will because of undue influence upon a testator, it must be shown: (1) That he was susceptible of being dominated by another; (2) that the person allegedly influencing him in the execution of the will was capable of controlling his mind and actions; (3) that such person did exert influence upon the decedent of a nature calculated to induce or coerce him to make a will contrary to his own desires; and (4) that the will is contrary to the decedent's own desires.

APPEARANCES: Francis X. Lamebull, Esq., Billings, Montana, for appellant; J. F. Meglen, Esq., Billings, Montana, for appellee. Counsel to the Board: Kathryn A. Lynn.

OPINION BY CHIEF ADMINISTRATIVE JUDGE PARRETTE

On May 11, 1984, the Board of Indian Appeals (Board) received a notice of appeal from Edith J. Half Reed (appellant). Appellant sought review of a March 9, 1984, order denying petition for rehearing entered in the estate of Thomas Longtail, Jr. (decedent), by Administrative Law Judge Daniel S. Boos. The order denied rehearing of an October 13, 1983, order approving decedent's will and ordering distribution of his Indian trust property to his niece, Cecelia Half Plainfeather (appellee). For the reasons discussed below, the Board affirms the March 9 order.

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Background

Decedent, Crow Allottee No. 3973, was born on February 2, 1925, and died on June 23, 1981, in Miles City, Montana. Hearings to probate decedent's Indian trust estate were held on January 27 and April 28, 1982, and January 14, 1983. As a result of testimony introduced at the hearings, the Administrative Law Judge found that the decedent's heirs at law were his 10 nephews and nieces, the children of a previously deceased brother, Oliver, and a previously deceased sister, Marie.

However, the decedent had executed a will on November 20, 1979, that left his entire estate, with the exception of $1 bequests to three of his other relatives, to appellee. Despite arguments that decedent was chronically confused and disoriented as a result of a lifetime of alcohol abuse and thus lacked testamentary capacity when he executed his will, and that appellee and her husband had exerted undue influence over decedent in connection with the execution of the will, Judge Boos approved the will on October 13, 1983.

By letter dated December 12, 1983, appellant petitioned for rehearing, providing additional information concerning decedent's testamentary capacity. The petition was accompanied by an affidavit from an attorney who stated that on October 17, 1979, decedent, in the company of appellee and her husband, had sought his assistance in having appellee appointed as decedent's conservator because his chronic alcoholism prevented him from caring for his property. The petition for conservatorship was filed with the Montana district court on December 4, 1979.

Judge Boos denied the petition for rehearing on March 19, 1984, quoting appellee's reply as follows:

> Excerpts from the transcripts in this proceeding show that the decedent, Thomas Longtail, Jr., was an alcoholic, suffered physical illness and was unable to manage his money when he was drinking. But these same transcripts tell us that on November 20, 1979, the day Thomas Longtail, Jr., made and executed his Last Will and Testament in the office of Myron Saltmarsh, he was sober, competent, and well.

Judge Boos also noted that under Montana law, even if a guardian had been appointed for the decedent, an incapacitated person for whom a guardian has been appointed is not presumed to be incompetent.

Appellant appealed this decision to the Board in a notice of appeal mailed on May 8, 1984. Over appellee's objection, the Board on May 22, 1984, determined that the appeal was timely; and the appeal was docketed on June 5, 1984, after receipt of the probate record. Statements by each party have been filed with the Board.

Discussion and Conclusions

On appeal, appellant's counsel, who did not represent her before Judge Boos, appears to argue that the proceedings below were inadequate, despite the three hearings, because appellant did not obtain an expert witness to testify about the effects of prolonged alcoholism on testamentary

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capacity. He also maintains that the Administrative Law Judge erred when he held that no undue influence was exerted upon the testator. A new affidavit from a medical expert who had examined decedent's medical records for appellant was attached to her opening brief. This expert concluded that, as of 1971, decedent suffered from significant alcoholic deterioration and borderline mental retardation; and she hypothesized that because decedent continued to drink, his mental deterioration would have increased in subsequent years. The expert concluded, however, that "[f]or appraisal of his legal competency * * * the best information would come from a psychologist or psychiatrist who works with alcoholics, especially if it was one who had seen Mr. Longtail in the last years of his life."

Appellee contends that appellant has produced no new evidence sufficient to justify a rehearing, arguing that the reason appellant's previous counsel had not produced a medical witness to testify that decedent lacked testamentary capacity when he made his will was that no such witness existed. Appellee asserts that: "The appellant has had extension after extension granted, both at the request of Attorney Stanton, and more recently at the request of Attorney Lamebull. Nothing has changed. The record stands uncontradicted. The decedent, Thomas Longtail, Jr., was competent when he made his will."

[1] We agree with appellee. The burden of proof as to testamentary capacity or undue influence in Indian probate proceedings is on those contesting the will. Estate of Verena Gean Kitchell, 12 IBIA 258 (1984); Estate of William Cecil Robedeaux, 1 IBIA 106, 78 I.D. 234 (1971). In this case, not only the scrivener of decedent's will but also each of the persons who witnessed it was of the opinion that decedent was competent when he executed the will. The scrivener testified that decedent had mentioned his desire for a will previously and had been told that he would first need a list of his lands; that decedent had come back in September 1979 with a list of his lands and given the scrivener the information necessary for drafting the will; and that decedent had returned twice in November 1979, first to sign the will as drafted and then, 8 days later, to add a codicil giving a dollar to each of three other relatives in order to ensure that his intention to leave his entire estate to appellee was clear.

[2] As to undue influence, the decisions of this Board have held that to invalidate an Indian will on the grounds of undue influence, it must normally be shown: (1) That the decedent was susceptible of being dominated by another; (2) that the person allegedly influencing the decedent in the execution of the will was capable of controlling his mind and actions; (3) that such a person did exert influence upon the decedent of a nature calculated to induce or coerce him to make a will contrary to his own desires; and (4) that the will is contrary to the decedent's own desires. See Kitchell and Robedeaux, supra. In this case, the scrivener stated that decedent told him that he was leaving his property to appellee because she had been good to him. Appellee was not present at the time of this discussion, nor had she accompanied decedent into the scrivener's office on any of the three occasions when the will was discussed. Appellant has failed to introduce any probative evidence to back up her assertion of undue influence with respect to the execution of the will.

It is clear from the foregoing that the decision of the Administrative Law Judge to deny a rehearing of the case was entirely proper. In fact, the

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wisdom of the decision to appeal this case to the Board might be open to question, inasmuch as Judge Boos held the case open for more than 15 months (from January 17, 1982, the date of the initial hearing, until May 2, 1983) in order to permit decedent's heirs additional time in which to obtain medical evidence sufficient to challenge the will. However, on the latter date, Judge Boos thought it necessary to issue an order to show cause by May 20, 1983, why any further continuance should not be denied and the record closed. In response to the order, a stipulation was entered into the record by the parties to this appeal as to the testimony of the only three doctors they were able to find who knew the decedent. The gist of the testimony of each doctor was that he was unable to offer any opinion as to decedent's mental capacity. Under such circumstances, an appeal based upon the medical testimony of someone else, who did not know the decedent and who clearly preferred to defer to the doctors who did, is of little avail. See Estate of Hank Cluette, 6 IBIA 47 (1977); Estate of Harold Humpy, 5 IBIA 132 (1976); and Estate of Lucy Feathers, 1 IBIA 336, 79 IND. 693 (1972).

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the March 9, 1984, order denying rehearing is affirmed.

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Bernard V. Parrette
Chief Administrative Judge

We concur:

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Jerry Muskrat
Administrative Judge

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Anne Poindexter Lewis
Administrative Judge

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